91-516

NO.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

BLAINE A. WHITE,

Petitioner

versus

UNITED STATES

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT COURT

PETITION FOR WRIT OF CERTIORARI

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The Questions Presented For Review

Did the Court of Appeals err when it failed to apply the doctrine of Collateral Estoppel?

Did the Court of Appeals err when it failed to find the second indictment against Petitioner barred on "Double Jeopardy" grounds?

Was there an error committed by the Court of Appeals when it refused to exclude evidence admitted against Petitioner in initial prosecution, which the government plans to reintroduce in the prosecution now facing Petitioner upon an expanded indictment?

Was an error committed by the Court of Appeals when it refused to find that the jury's verdict was inconsistent despite the fact that the exact elements of the offenses charged pertained to both, the count upon which the jury acquitted Petitioner, and, for the count upon which the jury was hung?

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Jurisdictional Statement

Date of Judgment sought to be reviewed June 28, 1991

No rehearing was sought in the Court of Appeals

The statutory provisions believed to confer jurisdiction upon this Court: 28 U.S.C. § 1254 (1)

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STATEMENT OF THE CASE

A. **Proceedings Below**

On June 28, 1991, the United States Court of Appeals for the District of Columbia Circuit denied Petitioner's Appeal of the ruling of the United States District Court for the District of Columbia, Thomas Francis Hogan, Judge.

The District Court ruling was a denial of Petitioner's motion to dismiss Counts 1,3,4, and 5 of the pending indictment charging Petitioner with violations of 18 U.S.C. § 371 § 1324 (a) (1) (c), § 1542 and § 2. The aforegoing is a subsequent indictment, lodged against Petitioner on October 9, 1990, following Petitioner's acquittal upon a charge of violating 18 U.S.C. § 1028 (a) (4) "fraud in connection with an identification document" (a birth certificate).

The jury was hung, with respect to Count II of the said indictment. Therefore, a mistrial was declared with respect to the Petitioner's violation of 18 U.S.C.§ 1542 (the identical violation charged in Count 4 of the present indictment pending against Petitioner.)

The appeal below was an interlocutory appeal, brought pursuant to Abney v. United States, 431 U.S. 651, 97 S. Ct. 2034, 52 L. Ed2d 651 (1977).

B. **Statement of Facts**

On or about March 19, 1990, Petitioner was indicted in Criminal No. 90-0129 (hereinafter referred to as "White I"). The Two (2) Count indictment charged Petitioner and a co-defendant, Harold David Linden, with knowingly possessing a birth certificate in the name of William Smith Baldwin, with the intent that such document be used to defraud the United States in violation of 18 U.S.C. § 1028 (a) (4) and § 2 (Count I) and with making false statements in an application for a passport for the use of Harold David Linden in violation of 18 U.S.C. § 1542 (Count II).

Petitioner was acquitted as to Count I. The jury, however, was hung with respect to Count II. The District Court granted a mistrial on July 3, 1990, and granted

government's motion to dismiss Count II, without prejudice, on July 25, 1990. Co-defendant, Harold David Linden, entered a plea of guilty to both counts on June 28, 1990, prior to the start of Petitioner's trial.

Petitioner was reindicted on October 9, 1990, along with Thomas G. Weyforth, and charged with four (4) counts: conspiracy, 18 U.S.C. § 371; making false statements in the application for U.S. passport for Harold David Linden, an alien, in the name of William Smith Baldwin, 18 U.S.C. § 1324 (a) (1) (c); concealing, harboring and concealing from detection Harold David Linden, an alien who had come to, entered and remained in the United States in violation of the law, 18 U.S.C. § 1542; and aiding and abetting 18 U.S.C. § 2. It should be noted that Count II of the indictment, obtaining by fraud, for the use of Harold David Linden, an I.N.S. Service Form I-94 in the name of Norman Harold Moore, was charged against Thomas G. Weyforth only. Thomas G. Weyforth entered a plea of guilty to all Counts on

1-10-91. Furthermore, the Court should be made aware that Count III of the present indictment is the identical charge that, the jury failed to reach unanimity upon in the trial of the Petitioner, referred to as White I.

Petitioner, on November 16, 1990, filed a motion to dismiss the White II indictment on the basis of double jeopardy and collateral estoppel. Petitioner, in his motion to dismiss, alleged that he would be subjected to double jeopardy in that the same evidence presented in the trial of White I would be again relied upon by the government in the pending indictment ("White II"). Petitioner also pointed out that the same conduct as was proved in White I would be again proved in White II.

In addition to the double jeopardy argument, Petitioner advanced the theory that the jury, in acquitting Petitioner on Count I of the White I indictment, ultimately decided the issue of knowledge/intent (no other issues were left for the jury to determine as Petitioner acknowledged that

he committed all acts complained of). Thus, the government would be estopped, in the subsequent proceeding from relitigating the same issues of knowledge and intent which are elements of each and every Count of the now pending indictment; White II.

The government filed its response to Petitioner's motion on November 30, 1990. Therein, the only substantive contention, was that the jury could have based its verdict of acquittal on issues other than the one (knowledge of intent) the Petitioner sought to foreclose. Specifically, the government contended that the jury might have grounded its verdict upon issues concerning possession of the birth certificate which was an essential element of the crime alleged.

The District Court held a hearing upon Petitioner's motion on December 11, 1990, and issued an "Order" and "Memorandum Opinion" denying Defendant's motion on December 20, 1990.

The District Court, with all due respect, in its memorandum, erroneously agreed with the government's position that possession was another issue upon which the jury could have grounded its verdict of acquittal. Thus, the District Court opined that Petitioner failed to meet his burden of showing that the issue of knowledge/intent was, in fact, ultimately decided by the jury in acquitting Defendant of Count I in White I. See Appendix pp. 15 & 16.

Again, with all due respect to the District Court, its rationale was contradictory to the record below. Specifically, during a bench conference on July 2, 1990, wherein the District Court and counsel for both, the government and Petitioner, agreed that "the defendant [Petitioner] actually possessed the birth certificate."

Furthermore, the Court, when instructing the jury as to the elements required for it to convict Petitioner of Count I and Count II in White I the Court, instructed the jury that

"the parties agree that Defendant [Petitioner] actually possessed the birth certificate."

The District Court's failure, to recognize and take into account, the fact that possession was an issue agreed upon by the parties and therefore, an issue the jury did not have to resolve, amounts to reversible error. Petitioner appealed from that error.

With all due respect to the Court of Appeals, it failed to recognize the fact that the elements of the crimes charged in both Counts I and II of the White I indictment were the same. Likewise, both counts required the same degree of proof, thus, acquittal upon Count I logically and rationally would lead to that same verdict with respect to Count II. Petitioner, with due respect to the Court of Appeals, submits that error was committed when it did not overturn the ruling of the District Court.

This case presented an issue of first impression for the District of Columbia Circuit. The matter below involved

neither a conspiracy, RICO, nor a multiple transaction prosecution. In the case at bar the single purpose for obtaining the birth certificate (Count I, White I) was to provide the same to Linden (whom Petitioner knew as Baldwin) such that a U.S. passport in the name of William Smith Baldwin would issue. Unlike the other cases with which the District of Columbia Circuit dealt involving double jeopardy and collateral estoppel, Petitioner, here, admitted all the acts complained of without interposing and entrapment defense; arguing instead lack of knowledge/intent. In fact, the matter at hand is distinguishable, on its facts, from matters involving the aforesaid issues on which even this Court has spoken.

ARGUMENT

Collateral Estoppel

The doctrine of collateral estoppel is encompassed in the 5th amendment guarantee against a defendant being placed twice in jeopardy for the same offense. Thus, a

prosecution for an offense is precluded when an issue of ultimate fact or an element essential to the conviction has been determined in defendant's favor by a valid and final judgment in a prior proceeding between the same parties. Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.ed.2d 469 (1970).

In addition to precluding subsequent prosecutions the doctrine of collateral estoppel also prohibits the government from introducing evidence, in a subsequent proceeding, with the aim of contradicting any ultimate fact which has been precluded by a prior judgment. United States v. Day, 591 F.2d 861, at 869 (1978).

The application of collateral estoppel is a question requiring examination of the entire record. In explaining the doctrine this Court made it clear that "the rule of collateral estoppel in criminal cases is not to be applied with the hypothetical anarchic approach of a 19th century pleading

book, but with realism and rationality" Ashe, Id. at 397 U.S. 445, 90 S.Ct. 1189.

Courts have been instructed to take a practical view of all circumstances in deciding whether collateral estoppel applies. This requires examining the record of the prior proceeding, including the pleadings, evidence, charge and jury instructions, and concluding "(whether a rationale jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration)". Id. conversely stated the rule requires "some legal necessity basic to one acquittal, not involved in the next trial to justify a superseding conviction." Any test more technically restrictive would, of course, simply amount to a rejection of the collateral estoppel rule in criminal proceedings, at least in every case where the first judgement was based upon a general verdict of acquittal. Ashe, Id.

In the case at bar, Petitioner, from a general verdict of acquittal, seeks to foreclose the issue of knowledge which

encompasses intent which Petitioner contends was ultimately determined in his favor via the acquittal upon Count I of the White I indictment. In accord with the authority cited we must now examine the record below.

Petitioner admitted, in both his direct and upon cross examination, all of the acts which the government charged in its indictment. Petitioner's only defense was, that he was unaware that Harold David Linden was using the alias of William Smith Baldwin, that Linden was a fugitive from the United Kingdom, and that Linden was in this country illegally. In fact, the government acknowledged that the only issue for the jury to resolve was the knowledge/intent of defendant at the time he committed the acts . This was the government's statement to the Court and the jury "[I] t's government's position that the actual acts charged are not in dispute and the issue only [sic] is the intent of the Defendant at the time he performed the acts."

Subsequent to Petitioner's advancing his position to the Court of Appeals the government countered by indicating that its analysis of the case was not necessarily that of the jury. Furthermore, the government advanced, in its memorandum in opposition to Petitioner's motion to dismiss on the grounds of double jeopardy and collateral estoppel, that the jury could have found that either Petitioner did not possess the birth certificate at the same time he possessed the intent to defraud the United States or that he possessed the requisite intent but not the birth certificate. The position which the government maintained in its opposition flies in the face of the facts since Petitioner, as stated above, stipulated to possession of the birth record.

The aforegoing is an example of the technically restrictive test which amounts to a rejection of the rule of Collateral Estoppel that this Court cautioned against in Ashe, supra at 397 U.S. 444. Ashe, goes on at n.9 to hold that, ..."if a court is permitted to state that the jury may have

disbelieved substantial and uncontradicted evidence of the prosecution on a point the Defendant did not contest, the possible multiplicity of prosecutions is staggering. "In fact, such a restrictive definition of 'determined' amounts to simply a rejection of collateral estoppel, since it is impossible to imagine a statutory offense in which the government has to prove only one element or issue to sustain a conviction." The Court below failed to appreciate the fact, that all issues, generally, and specifically possession, were agreed to. Thus, by process of elimination, the only issue remaining for the jury to determine with respect to both Count I and Count II of the White I indictment, was the intent/knowledge of the Defendant at the time he committed the acts. The intent/knowledge was the same for both Counts.

The government presented its case below in a seamless continuum which connected Count I and Count II of the White I indictment. Thus, the same knowledge/intent which the jury found absent with respect to Count I is the

very same knowledge/intent which the jury would have necessarily had to have found existed to convict Petitioner with respect to Count II.

Furthermore, since Petitioner is an attorney, the District Court, at Petitioner's request, permitted an instruction concerning "guilty knowledge" wherein the District Court gave, in the opinion of Petitioner, for the purposes of this analysis the most telling instruction as follows:

> "... You are further instructed that if you find that the application for the duplicate birth record **and** the affidavit, identifying Harold Linden as William Smith Baldwin which Defendant, Mr. White, filed to assist the issuance of the passport, were not completed for a **legitimate legal purpose** by an attorney during the **usual course of his professional practice** and under the facts and circumstances

known to him, he had every reason to believe that such purported documents had not been issued for a legitimate legal purpose, and that Defendant deliberately and consciously closed his eyes to what he had every reason to believe was the fact, such studied avoidance of positive knowledge is a circumstance from which you may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the purported documents had not been issued for a legitimate legal purpose and hence was **knowingly** completed by him." (Emphasis added).

In exonerating Petitioner based, in part, upon the aforesaid jury instruction, which used "and" as opposed to "or" when referring to the birth record and affidavit, the jurors found that Petitioner was acting for a legitimate and

legal purpose as an attorney in his usual course of professional practice under circumstances where he did not know that the documents he completed were for an illegitimate purpose. Thus, Petitioner had no guilty knowledge when he completed them. Logically, the jury could not have acquitted Petitioner on Count I in White I, in light of the pleadings, the evidence, and the jury instructions, without having resolved the issues of knowledge and intent as well as all subissues in favor of Petitioner.

DOUBLE JEOPARDY

In Grady v. Corbin, 110 S. Ct. 2084 (1990) this Court stated that the double jeopardy clause bars any subsequent prosecution in which the government, to establish an essential element of innocence charged in that prosecution will prove conduct which constitutes an offense in which the defendant has already been prosecuted.

The Court of Appeals did not reach this argument because in its words "the government has conceded, both before the District Court, see slip op. at 11, and in this Court, that it may not reprove conduct involving a birth certificate offense unsuccessfully prosecuted under the first indictment". (Appendix p.8). With all due respect to the Court of Appeals their reasoning is flawed. An essential element of the government's case is the birth certificate. The only way in which one can be issued an United States passport when he has only one form of identification, as in the cast at bar, is upon the affidavit of one who has knowledge of the identity of the passport applicant. Petitioner was that affiant. His affidavit was given in connection with another acceptable piece of identification, here, the birth record. Therefore, the government must show that a birth record was in the possession of Harold David Linden, which belonged to William Smith Baldwin, as an essential element of the offense which is charged in Count IV

of the White II indictment. In light of this fact the Grady, rationale applies thus precluding the proof of Petitioner's prior conduct. Furthermore, with respect to the other Counts of the indictment the government will have to prove Petitioner's knowledge of Linden as Baldwin. Since the jury could not have, rationally, acquitted Petitioner upon Count I of the White I indictment without determining his lack of Linden's true identity, any attempt to prove, in the subsequent prosecution, White's knowledge to the contrary, offends the dictates of double jeopardy.

INCONSISTENT VERDICT

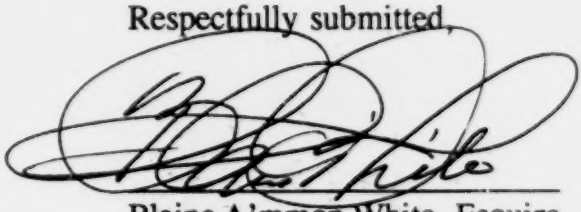
The Court of Appeals indicated in its opinion that it was "loath to impute [an] inconsistency to the jury", noting

the assumption that the jury acted rationally. Nevertheless, it has long been recognized that inconsistent verdicts are acceptable. This Court recognized that reality in Hamling v. United States, 418 U.S. 87, 101 (1974), United States v. Dotterweich, 320 U.S. 277, 279 (1945); and Dunn v. United States, 284 U.S. 390, 393 (1932). " Thus, while symmetry of results may be intellectually satisfying, it is not required." Hamling, Id. Thus, if juries can be inconsistent, courts can likewise find inconsistencies under the proper circumstances. In the case at bar such a circumstance exists. An inconsistent verdict can stand, even in the face of rationally incompatible findings provided there is sufficient evidence to support a guilty verdict. U.S.v. Merriweather, 777 F.2d 503 (1985), cert. denied 106 S.Ct. 1497, 475 U.S. 1098, 89 L.Ed.2d 898 (1985).

In the case at bar, the only issue was knowledge/intent of Petitioner. All other issues were either admitted to, or, stipulated to by Petitioner. The not guilty verdict upon

Count I of the White I indictment indicates that the jury forever determined that Petitioner did not possess the knowledge/intent necessary for guilt. Had the jury not made such a determination, then rationally Petitioner would have had to have been guilty on Count I. Thus, because the same knowledge/intent was required for both White I Counts, sufficient evidence no longer exists, to support a finding of guilt. The Court of Appeals, with all due respect, erroneously failed to acknowledge this reality. This Court should, therefore, grant this Petition For Writ of Certiorari.

Respectfully submitted,



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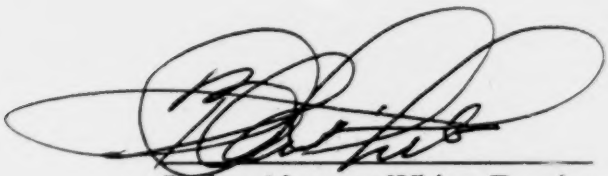
CERTIFICATE OF SERVICE

I, the undersigned, hereby certify this 25th day of September, 1991, that three (3) copies of the aforegoing Petition for Writ of Certiorari and three (3) copies of the Appendix thereto were mailed first class postage prepaid to John R. Fisher, Esquire, Assistant United States Attorney, 555 4th Street, N. W., Room 4229, Washington, D.C. 20001, Counsel for Respondent.



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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT COURT

APPENDIX

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 2, 1991 Decided June 28, 1991

No. 91-3021

UNITED STATES OF AMERICA,
APPELLEE

v.

BLAINE A. WHITE,
APPELLANT

Appeal from the United States District Court
for the District of Columbia

(Criminal No. 90-00427-01)

James Benny Jones for appellant.

Barry Wiegand, Assistant United States Attorney, with whom *Jay B. Stephens,* United States Attorney, and *John R. Fisher* and *Thomas J. Tourish, Jr.*, Assistant United States Attorney, were on the brief, for appellee. *Roy W. McLeese,* Assistant United States Attorney also entered an appearance for appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before EDWARDS, SENTELLE and HENDERSON, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* HENDERSON.

KAREN LECRAFT HENDERSON, *Circuit Judge*:

I.

Beginning on June 28, 1990, Blaine White was tried in district court on a two-count indictment. Count I alleged that the defendant possessed an unlawfully issued birth certificate with the intent to defraud the United States in violation of 18 U.S.C. § 1028(a)(4) & 2. Count II alleged that he made false statements in an application for a United States passport in violation of 18 U.S.C. § 1542 & 2. At trial, the government presented evidence showing that the defendant was the lawyer for Harold Linden, a Canadian citizen. On November 1, 1989, through false representations to the Maryland Division of Vital Records, the defendant obtained a certified copy of a birth certificate bearing the name William Baldwin. The defendant provided Linden with the birth certificate and also with a fake social security number. On November 13, 1989, the defendant and Linden appeared before a passport agent at the U.S. State Department. Linden applied for a U.S. passport in the name of William Baldwin; as proof of his identity, he offered the birth certificate in that name that the defendant had earlier obtained. On the passport application, Linden also used the fake social security number he had received from the defendant. In support of Linden's false passport application, the defendant signed an affidavit identifying the applicant as Baldwin and swearing that he had known the applicant for five years. As a result of this application, Linden obtained a U.S. passport in the name of William Baldwin. Linden was later arrested and, at the time of his arrest, he possessed both the U.S. passport bearing the name of William Baldwin and a British passport, also with his picture on it, in the name of Norman Moore.

The trial judge charged the jury that it could convict on Count I of the indictment only if it found that the defendant possessed an identification document other than one issued lawfully for use by him; that he acted wilfully; and that he intended to use the document to defraud the United States. To convict on Count II, the court charged the jury it must find that the defendant made a false statement in a passport application; that he acted wilfully; and that he intended to secure the issuance of a passport. The jury acquitted the defendant on Count I (the birth certificate count) and was unable to reach a verdict on Count II (the passport count). The district court granted a mistrial on Count II and dismissed it without prejudice on July 25, 1990.

On October 9, 1990, the government filed a second indictment charging the defendant and a co-defendant with offenses arising out of the same course of events. Count I of this indictment alleged as a violation of 18 U.S.C. § 371 the defendant's participation in a conspiracy to provide Linden with a fake British passport in the name of Norman Moore; to fraudulently obtain a U.S. Immigration and Naturalization Service Form I-94 in the name of Norman Moore; to make false statements in an application for a U.S. passport in the name of William Baldwin; and to shield from detection Linden, who remained in the country as an illegal alien. Count III alleged that, in violation of 8 U.S.C. § 1324(a)(1)(C) and 18 U.S.C. § 2, the defendant shielded from detection Linden, who was in the country as an illegal alien. Count IV essentially restated Count II of the earlier indictment, charging the defendant with knowingly making false statements in a passport application to secure issuance of a passport. Count V charged the defendant with aiding and abetting Linden in making false statements in a passport application in violation of 18 U.S.C. §§ 1542 & 2.[1]

In the district court, the defendant sought dismissal of

[1]Count II of the second indictment charged only the co-defendant.

the second indictment on two grounds. First, he argued that, in order to acquit him on Count I of the first indictment (White I), the jury must have found that he did not act wilfully. He contended that collateral estoppel precluded the government from retrying under the second indictment (White II) the issue of his intent when he committed the acts in question. He also argued that the fifth amendment's double jeopardy clause prohibited the government from introducing in the second trial any evidence it had used in the trial on the count of which he was acquitted in White I. The district court rejected both arguments, holding that the government could proceed with the prosecution of the second indictment. *See United States v. White,* No. 90-427, slip op. (D.D.C. Dec. 20, 1990). Seeking review of the district court's ruling, the defendant brought this interlocutory appeal. *See Abney v. United States,* 431 U.S. 651, 657-62 (1977).

II.

The double jeopardy clause incorporates the doctrine of collateral estoppel. *Dowling v. United States,* 110 S. Ct. 668, 671 (1990); *see also United States v. Bowman,* 609 F.2d 12, 17 (D.C. Cir. 1979).

> "Collateral estoppel" ... means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit....
>
> ... Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. The inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.

Ashe v. Swenson, 397 U.S. 436, 443-44 (1970) (footnote and internal quotation omitted). When a defendant seeks to invoke collateral estoppel, the burden is on him to "demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Dowling,* 110 S. Ct. at 673.

At trial, because the defendant did not deny committing the acts charged, the government stated at the close of its evidence that "the issue only [sic] is the intent of the defendant at the time he performed the acts." The appellant grounds his collateral estoppel argument on this statement, contending that, in acquitting him of the birth certificate count, the jury must have found that he lacked what he refers to as "knowledge/intent."

Under the appellant's argument, the acquittal represents a jury finding that his motives in connection with the possession of the birth certificate were entirely pure. He reads the acquittal as conclusively establishing both that he believed Linden to be Baldwin (and therefore did not act wilfully in illegally possessing the birth certificate bearing Baldwin's name) *and* that he did not intend to use the document to defraud the United States. He argues that the first verdict creates a collateral estoppel bar to the second prosecution: once the jury determined he was unaware of Linden's true identity, he asserts, the government could not relitigate this issue as it would have to in the second prosecution.

We do not read the implications of the appellant's acquittal so broadly. As the Court directed in *Ashe,* we examine the "charge and other relevant material," 397 U.S. at 444, to decide whether the jury must indeed have determined the issue the appellant seeks to foreclose from further litigation. This leads us to reject the appellant's broad collateral estoppel argument. Had the jury found, as the appellant contends, that he actually believed Linden to be William Baldwin, it would have acquitted him on the second count as well as the first. The finding that the defendant believed Linden to be Baldwin would have

extended to and controlled the verdict on the second count and the jury would have found that the defendant did not wilfully make a false statement in the passport application. Since the jury reached no verdict on the passport count, it must have based the Count I acquittal on a finding other than that which the appellant urges. *Cf. United States v. Scott,* 464 F.2d 832, 833 (D.C. Cir. 1972) (where jury acquitted defendant of armed robbery but reached no verdict on unarmed robbery, it did not necessarily find that defendant was not robber because that finding would have compelled acquittal of unarmed robbery as well; second trial for unarmed robbery not barred).

Accepting the appellant's argument would require us to assume that the jury acted inconsistently, reaching opposite findings on the same issue in the different counts. Because we are loath to impute such inconsistency to the jury, *cf. United States v. Powell,* 469 U.S. 57, 68 (1984) (noting "assumption that the jury acted rationally"), we hold the appellant has failed to carry the burden *Dowling* places on him to establish that the issue he seeks to foreclose was in fact determined in the first trial. *See* 110 S. Ct. at 673. Collateral estoppel does not bar the relitigation, under the second indictment, of the appellant's knowledge of Linden's true identity.

III.

The appellant next makes a series of arguments based on the double jeopardy clause. First, he attempts to pull from the double jeopardy clause a "same evidence" component that would bar from subsequent prosecutions all evidence the government has introduced in an earlier prosecution against the same defendant. In *Grady v. Corbin,* 110 S. Ct. 2084, 2093 & n.12 (1990), the Supreme Court rejected this argument, stating that, for the purpose of double jeopardy, "[t]he critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct." Accordingly, the appellant's argument for the sweeping exclusion from the second trial of all evidence introduced in the first one fails.

Next, the appellant asserts that, to the extent the second indictment charges crimes for which he stood trial under the first indictment, the double jeopardy clause bars prosecution of the second indictment. First, this argument fails with respect to the count on which the first jury reached no verdict because, for the conduct charged therein, the appellant is in continuing jeopardy. *See Richardson v. United States,* 468 U.S. 317, 326 (1984) ("a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which the petitioner was subjected"). Nothing prevents the government from retrying the appellant in connection with the conduct charged in the passport count of the first indictment: "retrial following a 'hung jury' does not violate the Double Jeopardy Clause." *Id.* at 324 (citing *Logan v. United States,* 144 U.S. 263, 297-98 (1892)). Since Count IV of the second indictment merely restates the charge in the passport count of the first indictment, prosecution of this count does not offend the double jeopardy clause.

The double jeopardy clause also offers no help to the defendant in his attack on Count III of the White II indictment. That count alleges that he knowingly harbored an illegal alien. This charge appeared for the first time in the second indictment and is unconnected with the White I allegations. It poses no double jeopardy problems.

With respect to the remainder of the second indictment, Counts I and V, the appellant asserts that the Supreme Court's holding in *Grady v. Corbin,* 110 S. Ct. 2084 (1990), bars a second trial because, in connection with these counts, the government would reprove conduct for which the appellant was prosecuted under the first indictment. In *Grady,* the Court stated:

> [T]he Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.-

Id. at 2093. We need not reach this argument because the government has conceded, both before the district court, *see* slip op. at 11, and in this court, that it may not reprove the conduct involving the birth certificate offense unsuccessfully prosecuted under the first indictment. *See* Government Brief at 32.[2]

We note that the government's concession limits it only slightly in the prosecution of Counts I and V. The government may still prove the defendant's conduct, for which he was not prosecuted in the first trial, of providing Linden with the fake social security number to use on the passport application. It may also reprove the defendant's sworn statement — as to which he is in continuing jeopardy — that he had known Linden as William Baldwin for five years.

IV.

The appellant's collateral estoppel argument lacks merit and we affirm the portion of the district court's order rejecting it. Because the government agrees that it may not reprove the White I birth certificate offense at the second trial, we also affirm that portion of the district court's order rejecting the appellant's double jeopardy challenge to the second prosecution.

So ordered.

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[2]The government concedes that it "cannot prove either the conduct of unlawfully procuring the birth certificate from the vital records office with intent to defraud the U.S. at that time, or of unlawfully possessing it with such intent at the passport office, as an essential element of the offenses charged in the second indictment." Government Brief at 32.

UNITED STATES CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the dame offense to be twice put in jeopardy of life or limb shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.